Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1977

No. 77-4814

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

—against—

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, ET ANO.,

Intervenors.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 27, 1977

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1516, 1517—September Term, 1976.

(Submitted March 25, 1977 Decided June 30, 1977.)

Docket Nos. 76-4151, 76-4153

GREENE COUNTY PLANNING BOARD, et al.,

Petitioners,

—v—

FEDERAL POWER COMMISSION,

Respondent.

POWER AUTHORITY OF THE STATE OF NEW YORK, et ano.,

Intervenors.

ON REHEARING EN BANC

Before:

KAUFMAN, *Chief Judge,*
LUMBARD, MANSFIELD, MULLIGAN, OAKES, GURFEIN,
VAN GRAAFEILAND and MESKILL, *Circuit Judges.**

Petition for review of that portion of an order of the Federal Power Commission denying requests of Greene County Planning Board, Town of Greenville, Town of Dur-

* Judges FEINBERG and TIMBERS did not participate in the consideration or determination of this rehearing.

ham and Association for the Preservation of Durham Valley for payment of litigation expenses.

Petition denied by court sitting en banc.

ROBERT J. KAFIN, Glens Falls, N. Y., *for Petitioners Greene County Planning Board and Town of Greenville.*

BARRY H. GARFINKEL, New York, N. Y., *for Petitioners Town of Durham, et al.*

PHILIP R. TELLEEN, Washington, D. C. (Drexel D. Journey, General Counsel, Robert W. Perdue, Deputy General Counsel. Allan Abbot Tuttle, Solicitor, McNeill Watkins, II, of Counsel), *for Respondent Federal Power Commission.*

SCOTT B. LILLY, New York, N. Y. (John C. Mason, Vito J. Cassan, Vincent J. Tobin, of Counsel), *for Intervenor Power Authority of the State of New York.*

RONALD A. ZUMBRUN, ROBERT K. BEST, RAYMOND M. MOMBOISSE, Sacramento, California (Albert Ferri, Jr., Glenn E. Davis. Lawrence P. Jones, Washington, D. C., of Counsel), *for Amicus Curiae Pacific Legal Foundation.*

VAN GRAAFEILAND, *Circuit Judge:*

After six years of litigation over the construction of a power line in Greene County, New York, the dispute between the parties has resolved itself into the issue of whether the Federal Power Commission is authorized to award counsel fees to petitioners who opposed the construction.

In 1972, when this case was before us on a prior appeal, we held that the Federal Power Act did not authorize the making of such an award. *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412, 426 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972). Following that decision, further hearings were held before the Commission, at the conclusion of which it denied petitioners' requests for counsel fees and expenses. Relying upon our ruling and upon the Supreme Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Commission found that it was not empowered to grant petitioners' requests. It also said in its opinion (No. 751, January 21, 1976):

> These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its rate payers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

Upon appeal, a panel of this Court, with one judge dissenting, reversed that portion of the order disallowing the applications for fees and remanded to the Commission for further consideration of petitioners' requests.[1] Petitions for en banc consideration were granted solely as to this issue and a majority of the Court, sitting en banc, hold that the petition for review of that portion of the Commission's order denying an award of attorneys' fees should be denied.

In arguing for remand, petitioners rely upon an in-

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1 The panel opinion left intact the orders of the Federal Power Commission which authorized construction of an electrical transmission line by the Power Authority of the State of New York.

terpretation of the Federal Power Act by the Comptroller General of the United States which is contrary to our own. In *Matter of Costs of Intervention—Nuclear Regulatory Commission,* B-92288 (Feb. 19, 1976), the Comptroller General held that the NRC had statutory authority to pay the legal expenses of intervenors. In a subsequent letter addressed to the Oversight and Investigations Subcommittee of the House of Representatives' Committee on Interstate and Foreign Commerce, the Comptroller General stated that this opinion was applicable to nine other agencies, including the Federal Power Commission. We are thus met squarely with the issue of whether this Court's interpretation of the Federal Power Act or that of the Comptroller General shall control the disposition of this appeal. We hold that our interpretation must control.

Congress has specifically provided that "[t]o the extent necessary to decision . . . the reviewing court shall decide all relevant questions of law," and "interpret constitutional and statutory provisions" and shall "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority or limitations. . . ." 5 U.S.C. § 706; *see Mulry* v. *Driver,* 366 F.2d 544, 549 (9th Cir. 1966). We are not prepared to abdicate the responsibility thus conferred by holding that the authority of the Federal Power Commission is to be determined by the Comptroller General's interpretation of the law rather than our own.

31 U.S.C. § 74 permits the head of an executive department, in his discretion, to apply to the Comptroller General for a commitment in advance that the General Accounting Office will not question the validity of a specific disbursement in passing upon the account of that department.[2] A commitment given in response to such a request

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2 The Federal Power Commission has never deemed itself authorized to pay the legal fees of private litigants and has sought no commitment from the Comptroller General as to the validity of such payments.

operates as a form of estoppel against subsequent challenge by the GAO. It is not, however, a binding legal opinion, but one which may be contested in the courts. *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F.Supp. 94, 100 (D.D.C.), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964). It is for the courts to determine the intent of Congress as expressed in its legislative enactments. In making this determination, as we do in this case, we interfere in no way with the authority of the Comptroller General to approve or disapprove disbursements made by executive agencies. We simply hold that the Federal Power Commission has no statutory authority to make the disbursements in question. *Cf. Miguel v. McCarl*, 291 U.S. 442 (1934).

We note that in *Matter of Costs of Intervention—Nuclear Regulatory Commission, supra*, the Comptroller General did not merely hold that the NRC had authority to pay legal expenses of intervenors: he specified the conditions under which payment could be made. He said: (1) NRC must believe that participation by the intervenor is required by statute or necessary to represent adequately opposing points of view; (2) the intervenor must be indigent or otherwise unable to bear the financial cost of participation. Subsequently, although there were no statutory changes, the Comptroller General modified these conditions, holding that payment is authorized if an agency determines that an expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination" of the issues even though the expenditure might not be essential. *See Matter of Costs of Intervention—Food and Drug Administration*, B-139703 (Dec.

This interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

3, 1976). The Comptroller General also perceived no legal objection to the making of awards "solely to ensure that a potentially affected interest is represented" or to giving the "representational role of the participant special weight in deciding whether to provide financial assistance." *Id.*

The authority of a Commission to disburse funds must come from Congress, *Turner* v. *FCC*, 514 F.2d 1354, 1356 (D.C. Cir. 1975); and it is for Congress, not the Comptroller General, to set the conditions under which payments, if any, should be made. No officer or agent of the United States may disburse public money unless authorized by Congress to do so. *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294 (1941); *Heidt* v. *United States*, 56 F.2d 559, 560 (5th Cir. 1932); *Fansteel Metalurgical Corp.* v. *United States*, 172 F.Supp. 268, 270 (Ct.Cl. 1959). Sums appropriated for the various branches of expenditure in the public service must be applied solely to the objects for which appropriations were made and for no others. 31 U.S.C. § 628. Congress has shown a lively interest in the matter of financial assistance for intervening parties, and legislation dealing with this subject has been introduced in both the 94th and 95th Sessions of Congress.[3] In light of the Supreme Court's very broad language in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, 421 U.S. at 257, that "absent statute or enforceable contract, litigants pay their own attorneys' fees", a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action.

The petitions for review are denied.

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3 Congress is presently deliberating three bills dealing with the subject of intervenors' costs. They are collectively identified as "Public Participation in Federal Agency Procedures Act of 1977", S.270, H.R. 3361 and H.R. 3362.

KAUFMAN, *Chief Judge* (concurring):

I would add only one brief comment to my brother Van Graafeiland's reasoned opinion. The decision whether to expend public funds to advance an essentially private point of view by its very nature is political and, in a democracy, more appropriately made by the elected representatives of the people. All interested individuals can claim, with utmost sincerity, to represent the "public". Some selection among potential intervenors becomes necessary, therefore, to assure a fair and balanced presentation of the various viewpoints while insuring, at the same time, that the agency does not exceed its financial constraints. Such choices are particularly unamenable to judicial structuring. Indeed, the Supreme Court, in the *Alyeska Pipeline* case, refused to give the courts the right to determine, in the absence of legislative guidelines, which public policies are sufficiently important to warrant exceptions from the general prohibition of fee shifting. And the Comptroller General himself in *Matter of Costs—NRC*, at 8, stated:

> . . . [W]e believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the FTC by the "Magnuson-Moss" Act.

Our three prior decisions in this seemingly interminable case demonstrate the critical and important role that intervenors can play in agency decision-making. I believe that expanded participation by advocates of a variety of public interests before agencies would tend to decrease the number of appeals taken to the federal courts and also the number of cases remanded to agencies because the

record failed to reflect adequate consideration of the concerns of all affected parties. Nevertheless, if Congress is of the view, as I am, that a reliable source of funding is a *sine qua non* to effective public participation in agency proceedings, it should appropriate money to that end. At the same time it should establish a comprehensive and flexible framework that will assure vigorous and independent representation of the public interest and avoid potential abuses.

Thus, while I agree with my dissenting brethren that public funding has become necessary to the optimal functioning of the administrative process, I do not agree that the decision of the en banc majority is an "unfortunate step backward." I would rather characterize it as an eschewal of the inevitable pitfalls of "judicial lawmaking" in the face of congressional inability to resolve the dilemmas posed by these sensitive issues.

LUMBARD, *Circuit Judge*, with whom MANSFIELD and OAKES, *Circuit Judges*, join (dissenting):

I respectfully dissent from the en banc court's decision. In view of the Comptroller General's recent decision on agency reimbursement of intervenors' expenses, I believe we should remand to the FPC for further consideration of the intervenors' request in this case. I do not think the Commission's authority to pay intervenors' litigation expenses has been precluded by our decision in *Greene County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972), or by the Supreme Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

The question raised in *Greene County I* was whether the court should order the Commission to pay for intervenors' expenses. On this issue, the panel concluded:

> [W]e find ourselves in agreement with the Commission's position that at this posture of the proceedings and under current circumstances, without a clearer congressional mandate we should not order the Commission . . . to pay the expenses and fees of petitioners . . . .
>
> . . .
>
> Without a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules.
>
> 455 F.2d at 426, 427.

In deciding whether the FPC could be required by court order to pay intervenors' expenses the *Greene County I* panel considered two statutes, § 309 of the Federal Power Act, 16 U.S.C. § 825h, which deals with the FPC's rule-making powers, and § 314(c) of that Act, 16 U.S.C. § 825m(c), which authorizes the Commission to employ attorneys for its own use. Finding no such requirement in these statutes, the panel understandably reasoned that a court should not order an agency to disburse funds "without a far clearer congressional mandate," 455 F.2d at 426.

Such caution was appropriate: since the power of the purse belongs to Congress, a court is not free to disburse agency funds whenever it thinks this would be fair. Not only would such judicial freelancing impinge on Congress' constitutional prerogatives, it would also tend to place administrators in the embarrassing position of trying to follow a court's order without any assurance that the funds would be available. For this reason, courts have declined to order agency disbursements over the opposi-

tion of Congress' auditing agent, the Comptroller General, except where the duty to pay is "free from doubt." Compare *Brunswick* v. *Elliot*, 103 F.2d 746, 750-51 (D.C. Cir. 1939), with *Miguel* v. *McCarl*, 291 U.S. 442, 454 (1934).[1]

We are now dealing with a different issue, which is whether the Commission has discretionary authority to pay for intervenors' expenses if it considers such reimbursement to be necessary or desirable. That federal agencies possess such discretionary authority has been recognized by the Comptroller General since the *Greene County I* panel decision, and in the case of the FPC would be based on two statutes that were not considered by that panel, § 308 of the Federal Power Act, 16 U.S.C. § 825g,[2] which deals with Commission hearings, and the statute enacted by Congress which provides a general appropriation to pay for "expenses necessary for the work of the Commission," 90 Stat. 889, 898.[3] As head of the General Accounting Office, the Comptroller General has the power to pass in advance on the legality of administrative expen-

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1 An adverse Comptroller General's ruling does not prevent a claimant from pursuing a suit for money damages against the United States in the Court of Claims. *United States ex rel. Brookfield Construction Co.* v. *Stewart*, 234 F. Supp. 94, 100 (D.D.C.), aff'd 339 F.2d 753 (D.C. Cir. 1964); see, e.g., *Iran Nat'l Airlines Corp.* v. *United States*, 360 F.2d 640, 641-42 (Ct. Cl. 1966).

2 16 U.S.C. § 925g(a) provides:

> (a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it . . . . In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

3 The FPC's appropriation was for the fiscal year here in question over $41 million. The Commission is authorized by 16 U.S.C. § 798 to make "such expenditures . . . as are necessary to execute its functions."

ditures. See 31 U.S.C. § 74.[4] Approval by the Comptroller General assures the agency making the disbursement that the necessary funding will not later be withheld by Congress. By his decision in Matter of Costs of Intervention —Nuclear Regulatory Commission, Dec. B-92288 (Feb. 19, 1976), and Matter of Costs of Intervention—Food & Drug Administration, Dec. B-139703 (Dec. 3, 1976), and by his May 10, 1976 letter to the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, the Comptroller General has categorically held that the FPC has discretionary authority to reimburse expenses of impecunious intervenors who " 'contribute substantially to a full and fair determination of' the issues before it." Costs of Intervention—FDA, supra at 5.

Since the Comptroller General is Congress' chief agent for guarding the public fisc, his opinions on expenditure issues are comparable to those of any agency in its area of special responsibility, and they are entitled to at least as much deference from courts as is given to an enforcing agency's statutory interpretations. see, e.g., *Volkswagenwerk Aktiengesellschaft* v. *FMC*, 390 U.S. 261, 272 (1968); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Judicial deference is particularly appropriate here where the Comptroller's General's interpretation is one which limits rather than ex-

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Moreover, under section 6 of the Federal Power Act, 16 U.S.C. § 799, licenses issued by the Commission include the condition of section 10(e) that the licensee pay a share of the Commission's administrative costs. Thus the license is in the nature of a contract under which the licensee expressly agrees to share administrative costs, including fees required to be paid.

4 In passing on the legality of expenditures, the Comptroller General has a "judicial duty" to "determine finally the construction of statutes." See Joint Commission Report, 26 Cong. Rec. at 7483-84 (1894); 21 Op. [Att'y Gen.] 178, 181 [1895].

pands his power over the purse strings. Compare *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973).

The Comptroller General based his decision on the proposition that:

> where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available.

Costs of Intervention—NRC, supra at 3. Since public hearings are integral to the functioning of an agency such as the FPC, authorization for reimbursement of indigent intervenors who make important contributions in these hearings can reasonably be found in the agency's general statutory mandate, see 16 U.S.C. § 793, as well as § 825g. See also Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 Harv. L. Rev. 1815, 1828-29 (1975).

Although express statutory authorization is required before either a court or a regulatory commission can order one litigant to pay a prevailing litigant's expenses on the ground that the prevailing litigant represents the public interest, *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Turner* v. *FCC*, 514 F.2d 1354 (D.C. Cir. 1975), fee reimbursement is distinguishable from fee shifting because it involves no direct exercise of compulsion against a private party.[5] *Alyeska* was decided in the context of a long history of cases upholding the "American

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5 Here, indeed, there is not the fee-shifting that was prescribed in *Alyeska*; at least to the extent of the Commission's own general appropriation, note 3 *supra* and accompanying text, any fees paid to intervenors can properly be said to come from the Commission's own

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Rule" against taxing attorneys' fees to the losing party, see 421 U.S. at 247-54; a general statute for taxing costs, 28 U.S.C. § 1920, which was intended to be comprehensive and which omitted attorneys' fees from the list of allowable costs, see 421 U.S. at 255-56; and a number of statutes explicitly authorizing attorneys' fees assessments in certain specific types of cases, see 421 U.S. at 260-62. None of these factors is present here. Because "public interest" intervention is largely a recent development, there is no long-established rule against agency funding for intervenors. Congress has legislated on the subject only twice, see Toxic Substance Control Act, 15 U.S.C. § 2620(4)(c); Clean Air Act § 304(d); moreover, in declining to enact provisions for attorneys' fees payments in proceedings before the Nuclear Regulatory Commission, Congress declared that its intention was to let the NRC decide for itself whether parties should be given reimbursement for attorneys' fees. See House Conference Rep. No. 93-1445, 1974 U.S. Code Cong. & Adm. News at 5550-51. Accordingly, I conclude that it was altogether reasonable for the Comptroller General to find that agency reimbursement of intervenors' attorneys' fees need not await further legislation from Congress.[6]

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funds, not those of the licensee. To the limited extent that this might not be true, moreover, by virtue of the licensee's statutory duty under section 10(e) of the Federal Power Act, 16 U.S.C. § 803(e), to pay a share of the Commission's administrative costs included as a condition of the license which is agreed to by the licensee under section 6, 16 U.S.C. § 799, any "shifting" of fees involved would be done by the contract—the license itself. This is perfectly proper under *Alyeska*, 412 U.S. at 257 ("the general rule that, *absent statute or enforceable contract*, litigants pay their own attorneys' fees") (emphasis added).

6 Despite the fears expressed by my brother Kaufman about "judicial structuring" and "judicial lawmaking," I see no cause for concern here. It would be the administrative agency, and not the court, which in the first instance would determine whether intervenors make a substantial enough contribution to the administrative process to merit a fee award.

The decision of the en banc majority seems an unfortunate step backwards. Public funding for public interest intervenors has become necessary to the optimal functioning of the administrative process. Involvement in administrative proceedings is time-consuming and expensive, and where individual interests are diffuse and noneconomic these costs are a substantial barrier to effective participation.[7] When good citizens are willing to give their time and money to voice a broader public interest and thus to make useful contributions to government decisionmaking, there should be some means for reimbursing their reasonable attorneys' fees, expert witness costs, and other expenses. Otherwise, many good causes will be crippled because of financial limitations on presentation, and many others will go unpled. Intervenors who represent public interests in addition to their own interests have important contributions to make to the regulatory process.[8] Where such intervenors aid an agency in performing its statutory duties, it is only fair that the costs of intervention should be treated as part of the cost of agency administration.

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7 See 88 Harv. L. Rev. at 1819 & n.23.

8 See Leventhal, *Attorneys' Fees for Public Interest Representation*, 62 A.B.A.J. 1134 (1976).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GREENE COUNTY PLANNING BOARD,
et al.,

Petitioners,

-against-

FEDERAL POWER COMMISSION,

Respondent.

POWER AUTHORITY OF THE STATE
OF NEW YORK, et ano.,

Intervenors.

- - - - - - - - - - - - - - - - - - x

76-4151
76-4153

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed by counsel for both the petitioners and respondent, a majority of the court has voted to grant reconsideration en banc limited to the question whether the Federal Power Commission is authorized to reimburse the

intervenors for counsel fees and expenses. The petitions for rehearing en banc are denied in all other respects. The court does not deem oral argument necessary, but directs that additional briefs be filed, as follows:

Petitioners' brief: March 8, 1977

Respondent's brief: March 22, 1977

Petitioners' reply brief: March 25, 1977

The case will be deemed submitted on March 25, 1977.

The en banc court will include Judge Lumbard, a Senior Judge who was a member of the original panel.

Judge Oakes dissents from the court's decision to limit its en banc rehearing to the question of the Federal Power Commission's authority to reimburse intervenors.

Judge Feinberg did not participate in consideration of this case. Judge Timbers did

not participate in the consideration or determination of the petition for rehearing en banc at this stage of the en banc proceedings.

s/ Irving R. Kaufman
Chief Judge

February 15, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 500 and 501—September Term, 1976.

(Argued October 27, 1976 Decided December 8, 1976.)

Docket Nos. 76-4151 and 76-4153

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

—v.—

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK and UNITED BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1249,

Intervenors.

Before:

LUMBARD and VAN GRAAFEILAND, *Circuit Judges,* and BONSAL, *District Judge.**

Petitions for review of final orders by the Federal Power Commission which authorized construction of a power line under 16 U.S.C. § 797(e) and denied requests for payment of litigation expenses.

* Sitting by designation.

Petitions denied in part and granted in part; case remanded to the Commission for further consideration with respect to litigation expenses incurred by some of the parties.

ROBERT J. KAFIN, Esq., Glens Falls, New York, *for Petitioners, Greene County Planning Board and Town of Greenville.*

BARRY H. GARFINKEL, Esq., New York, New York, *for Petitioners, Town of Durham, et al.*

PHILIP TELLEEN, Esq., Washington, D.C. (Drexel D. Journey, General Counsel, Robert W. Perdue, Deputy General Counsel, Allan Abbot Tuttle, Solicitor, McNeill Watkins, II, and David P. Boergers, Attorneys, Federal Power Commission, Washington, D.C., on the brief), *for Respondent.*

THOMAS F. MOORE, JR., Esq., New York, New York (Scott B. Lilly, John C. Mason, Vincent J. Tobin and Arthur J. Kalita, Attorneys, on the brief), *for Intervenor, Power Authority of the State of New York.*

JULES L. SMITH, Esq., Syracuse, New York (Blitman and King, Bernard T. King, Esq., on the brief), *for Intervenor, International Brotherhood of Electrical Workers Local Union 1249.*

LUMBARD, *Circuit Judge:*

These petitions for review under 16 U.S.C. § 825(b) of orders of the Federal Power Commission authorizing con-

struction of an electrical transmission line by the Power Authority of the State of New York and declining to award attorneys' fees and other litigation expenses to various intervenors provide the fourth occasion for this court to review aspects of PASNY's efforts to construct a 35 mile power line through the scenic Durham Valley in Greene County.[1] The Commission issued its opinion and order on January 29, 1976, and on April 27, 1976 it denied a motion to reopen the record.

The Greene County Planning Board and the Town of Greenville (hereinafter "Greene County") assert that the Commission violated its duties under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq., and under the Federal Power Act, 16 U.S.C. §§ 791 et seq., by improperly limiting its analysis of benefits and adverse impacts rather than considering related, pending projects and broader systemic concerns and alternatives. Moreover, petitioners claim the Commission should have reopened the record to consider newly-available data on electricity consumption and other evidence tending to rebut its conclusion that the power line is necessary. They also make various complaints about the adequacy of the Commission's environmental impact statement and the fairness of the hearing conducted by the administrative law judge. We conclude that the Commission has fulfilled its obligations under NEPA and the FPA, and that none of petitioners' other claims warrant reversal.

The Town of Durham and the Association for the Preservation of Durham Valley, intervenors before the Commission who were successful in urging the selection of an alternative route for the power line, join with Greene

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1 *Green County Planning Board* v. *FPC*, 455 F.2d 412 (2d Cir.), cert. denied, 499 U.S. 849 (1972); *Greene County Planning Board* v. *FPC*, 490 F.2d 256 (2d Cir. 1973); *Greene County Planning Board* v. *FPC*, 528 F.2d 38 (2d Cir. 1975).

County in asking us to reverse the Commission's refusal to pay for their litigation expenses. Since recent rulings by the Comptroller General indicate that the FPC has authority to grant these reimbursements in appropriate circumstances, we remand to the Commission for further consideration of this issue with respect to the Durham petitioners.

I.

The history of this case dates back to August 1968 when the PASNY applied for approval from the FPC for construction of an 1100-megawatt pumped storage facility near Gilboa, New York. Under 16 U.S.C. § 797(e) the FPC has licensing jurisdiction over such a hydroelectric project and over any transmission lines that are designed for the primary purpose of serving the project. The plan for the Gilboa project was approved by the Commission in June 1969, and it envisaged three 345 kilovolt transmission lines, specifications for each of which would be subject to final review by the Commission. One line was to run southwest to Dehli, one northeast to New Scotland (near Albany), and one southeast for 35 miles to Leeds. Plans for these lines were soon submitted, and the Dehli and New Scotland lines were promptly approved without arousing significant opposition. Environmental controversy arose over the proposed Leeds line, however, and various opponents ultimately received permission from the Commission to intervene. After some reworking of the Leeds proposal by the PASNY, a hearing before Administrative Law Judge William C. Levy commenced on November 9, 1971.

The hearing continued until interrupted by order of this court on January 17, 1972. In *Greene County Planning Board* v. *FPC (Greene County I)*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972), we ruled that the FPC

was violating NEPA by conducting hearings in reliance on the environmental report submitted by the PASNY, instead of first having prepared its own environmental impact statement. Id. at 422. The FPC staff was ordered to prepare its own impact statement to serve as a foundation for cross-examination of PASNY and FPC witnesses at the hearing. In *Greene County I* we also cautioned the Commission not to ignore broad but potentially relevant considerations such as future power demand and supply, alternative sources of power, and impending plans for further power facility construction.

After its petition for certiorari had been denied, the FPC set about the task of complying with this court's mandate by drafting an impact statement, soliciting comments, and preparing a final impact statement. The hearing then recommenced[2] and ran for two and a half months before the record was closed on October 27, 1973. Considerable expert engineering testimony on the need for the transmission line and testimony on its environmental impact was adduced from the PASNY employees charged with the planning and evaluating of the line and also from the employees of the FPC who had prepared the environmental impact statement. The Durham intervenors put on their own environmental experts to testify against the PASNY's preference for a route running through the Durham Valley, which is an especially scenic part of Greene County. The Greene County intervenors sought to call as their own expert witness an environmental engineer employed with the Office of Environmental Planning of the New York State Public Service Commission, but Judge Levy ruled that the state was not required to furnish such expert testimony.

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2 The intervenors again sought a stay of the hearing from this court, this time on the basis of inadequacies in the impact statement; but these challenges were rejected as premature in *Greene County Planning Commission* v. *FPC* (*Greene County II*), 490 F.2d 256 (2d Cir. 1973).

On July 1, 1974, Judge Levy issued his opinion authorizing construction of a Gilboa-Leeds line and selecting as environmentally least harmful a route that skirted the Durham Valley, twenty-nine months later the Commission affirmed.

The Commission's finding of need for the transmission line rested on substantial evidence that the line is necessary if the PASNY is to make optimal use of the Gilboa power storage facility. Engineering opinion was unanimous that the Gilboa-Leeds line would significantly improve the "reliability and stability" of power transmission from the Gilboa project, as well as increasing the "transfer capability" of the overall PASNY network. Thus, the line would ensure access to readily available and inexpensive Gilboa power at times of peak consumption in New York City and other parts of the state, and it would also increase the PASNY's capacity to meet localized peak demands by transferring power as needed to and from various points within eastern New York.

The Commission also decided that the 345 kv transmission line should be constructed with the capability of being expanded to two 345 kv lines or a 765 kv line if the need for the additional transmitting capacity were to arise in the future. The second 345 kv circuit would be most useful if a second hydroelectric storage project presently under PASNY and FPC consideration were to be constructed in the vicinity of Gilboa; upgrading the line to 765 kv would be called for if the PASNY decided to go forward with its plans to upgrade its overall network of lines with which the Gilboa-Leeds line connects; and the Commission concluded that convertibility of the 345 kv line would result in substantial environmental and construction cost savings if either of these likely contingencies were to develop.

The Commission rejected Greene County's motion that it reopen the record in order to consider recent data indi-

cating that electricity consumption in New York City and the rest of the state has significantly and unexpectedly declined, and also that since its construction in 1973 the Gilboa facility has been able to function without mishap and at full capacity by using just the Gilboa-New Scotland and Gilboa-Dehli transmission lines. The Commission said that this new information would not require any modification of its order for the construction of the Gilboa-Leeds line.

II.

The purposes of NEPA are frustrated when consideration of alternatives and collateral effects is unreasonably constricted. This can result if proposed agency actions are evaluated in artificial isolation from one another. Accordingly, an agency is required to consider the full implications of each decision in light of other potential developments in the area, and to prepare a comprehensive impact statement if several projects are significantly interdependent. *Kleppe* v. *Sierra Club*, 49 L. Ed. 2d 576, 590 (1976); *Chelsea Neighborhood Ass'n* v. *United States Postal Service*, 516 F.2d 378, 388 (2d Cir. 1975); *Natural Resources Defense Counsel* v. *Callaway*, 524 F.2d 79, 87-90 (2d Cir. 1975). A balance must sometimes be struck between the importance of going forward with a project presently under consideration and the danger of improperly "piggybacking" several related projects by justifying each of them on the assumption that the others are to be constructed, only to discover later that the overall combination of the projects may do more harm than good.

With these principles in mind, we concur in the FPC's conclusion that the Gilboa-Leeds transmission line is an appropriate unit for an impact statement. On the basis of substantial evidence, the Commission found that the line is necessary in order for the state to make optimal use of the

They object specifically to two rulings: (1) the refusal to allow them to use a state employee as their own expert witness, and (2) the refusal to order the FPC to produce a potentially relevant staff report.

With respect to the first ruling, we do not agree with respondent's assertion that employees of applicants can never be subpoenaed to furnish expert testimony before the FPC. The Administrative Procedure Act, 5 U.S.C. § 555(d), provides that agency subpoenas shall issue "on a statement or showing of general relevance and reasonable scope of the evidence sought." The agency must determine what constitutes "reasonable scope" in each case. *See, e.g., Independent Directory Corp.* v. *FTC,* 188 F.2d 468, 470-71 (2d Cir. 1951). Although *Virginia Petroleum Jobbers Ass'n* v. *FPC,* 293 F.2d 527, 529 (D.C. Cir.), *cert. denied,* 368 U.S. 940 (1961), indicates that opponents of an application are not routinely entitled to free run of the applicant's experts, this does not mean that subpoenas of experts are never appropriate where, for example, the parties seeking the subpoena are unable to afford their own experts, the expert testimony sought would be highly relevant, and the employer-applicant is itself a government entity with a corresponding obligation to serve the broad public interest. Nonetheless, since substantial environmental evidence was already in the record and since the witness, Frank Brugraff, was expert only in the environmental effects of transmission lines, there is little reason to believe that his expert testimony would have affected the Commission's ultimate finding of need for the line. In light of this consideration, we cannot say that curtailment of Burgraff's examination was an abuse of discretion.

The document at issue in the second ruling was a 1969 internal agency report prepared by the FPC staff which concluded that the Gilboa-Leeds line would function for the primary purpose of serving the Gilboa hydroelectric facility

and would therefore be subject to FPC jurisdiction under 16 U.S.C. § 797(e). Certainly, the standards for discovery in an administrative proceeding should not be more restrictive than the standards for disclosure under the Freedom of Information Act, 5 U.S.C. § 552. *See* generally Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memoranda,* 86 Harv. L. Rev. 1047 (1973). Subject to such considerations as confidentiality and the need for unencumbered intra-agency circulation of preliminary views, *see International Paper Co.* v. *FPC,* 438 F.2d 1349, 1358-59 (2d Cir.), *cert. denied,* 404 U.S. 827 (1971); *Ackerley* v. *Ley,* 420 F.2d 1336, 1341 (D.C. Cir. 1969), approved staff reports that are relevant should generally be made available to parties in an agency proceeding. *See, e.g., GSA* v. *Benson,* 415 F.2d 878, 880-81 (9th Cir. 1969). Nevertheless, any failure of discovery here does not warrant reversal since the "primary line" report would have been merely cumulative of the substantial evidence already in the record on this function of the Gilboa-Leeds line.

Petitioners also allege that the environmental impact statement is not based on sufficient independent staff analysis, *see* C.F.R. § 281(b), fails to use an interdisciplinary approach, and is too abstract and too argumentative. We disagree. At the hearing the FPC staff experts testified that, as required by NEPA, *see Greene County I,* 455 F.2d at 420, they had conducted their own evaluation of the need for, and impact of, the transmission line; their reliance on PASNY computer studies and on power-flow data routinely recorded by the PASNY and other electric utilities was not an unreasonable abrogation of their analytical responsibilities. As for the other criticisms, we have read the impact statement and find them to be unpersuasive.

III.

With respect to the intervenors' attorneys' fees and witness expenses the Commission denied all requests for reimbursement, holding that it lacked the authority to make such payments and that none of the intervenors deserved such compensation in any event since they had only been "protecting their own interests." When the same matter was before us in *Greene County I*, we had declined to order the FPC to reimburse intervenors in the absence of express Congressional authorization. 455 F.2d at 426.

While this appeal has been pending, however, the Office of the Comptroller General has announced that in its opinion the FPC does have authority to pay for intervenors expenses. In Matter of Costs of Intervention—Nuclear Regulatory Commission, Decision B-92288 (February 19, 1976), the Comptroller General ruled that the NRC has implied authority to reimburse impecunious intervenors. A letter of May 10, 1976 from the Comptroller General to the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce indicates that this decision is equally applicable to the FPC and eight other agencies: "appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation." [3]

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3 It appears from the record that neither of the Comptroller General's rulings were considered by the Commission when it reached its decision in the instant case. The February 19 ruling on the NRC was issued just one week before Durham's petition for rehearing was filed, and no reference is made to the NRC ruling in either the rehearing petition or the Commission's denial of that petition. The May 10 letter, which

Since the Comptroller General is Congress's agent for the purpose of determining the legality of administrative expenditures, *see* 31 U.S.C. § 65(d), his decision "upon any question involving a payment to be made by [an agency] . . . shall govern the General Accounting Office in passing upon the account containing such disbursement." 31 U.S.C. § 74. The Comptroller General's decision is authoritative and cannot be reversed by a court unless clearly contrary to law. *See Brunswick* v. *Elliott*, 103 F.2d 746, 749 (D.C. Cir. 1939).[4]

Although express statutory authorization is required before either a court or a regulatory commission can order one litigant to pay a prevailing litigant's expenses on the ground that the prevailing litigant represents the public interest, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Turner* v. *FCC*, 514 F.2d 1354 (D.C. Cir. 1975), the Comptroller General has concluded that fee reimbursement is distinguishable from fee shifting because it involves no exercise of compulsion against a private party.

Since public hearings are integral to the functioning of an agency such as the FPC, authorization for reimbursement of indigent intervenors who make important contributions in these hearings can reasonably be found in the agency's general statutory mandate. See 16 U.S.C. § 793 ("The commission may make such expenditures . . . as are necessary to execute its functions."). On this basis the Comptroller General's decision is not clearly incor-

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dealt with the FPC specifically, postdates all of the Commission's decisions on reimbursement in this case.

4 *Miguel* v. *McCarl*, 291 U.S. 442 (1934), and *McCarl* v. *Cox*, 8 F.2d 669, 671 (D.C. Ct. App. 1925), cited by Judge Van Graafeiland in his dissent, were cases where the Comptroller General's rulings were clearly contrary to law.

rect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses.[5]

Still, the Commission has implied that even if it had the authority it would not grant fees and expenses to the Durham petitioners because they were only "protecting their own interests," and it is argued that we should affirm on this ground. However, we have some doubts about the fairness of withholding funds from these particular petitioners. All intervenors in agency proceedings are engaged in protecting their perceived self-interests; otherwise they would not bother to intervene. Although the Durham intervenors were acting in their own interests, they were at the same time serving the broader public interest in the preservation of unspoiled scenic countryside. They seem to have played an essential role in the proceedings: it was their evidence and advocacy that appears to have been responsible for persuading the Commission to reject the preference of its own staff and the PASNY for the slightly shorter route running through the Durham Valley. Thus, the Commission was substantially aided in making its determination by the action of the intervenors. Where environmental issues are involved, a salutary public interest is served if the parties affected have the opportunity to express their views. Otherwise, the Commission could be limited to the information made available to it by the power companies and business interests directly involved. Moreover, it seems quite possible that the Durham petitioners could qualify as "indigent" in that their litigation obligations may be unreasonably large in comparison to their financial resources.

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5 Reasonable reimbursement should include reimbursement for out-of-pocket expenses incurred by the intervenors, reimbursement for experts' fees and expenses, payment of reasonable attorneys' fees to intervenors' counsel, and reimbursement for out-of-pocket expenses and disbursements incurred by counsel.

Under these circumstances, where there is a good chance that the Durham intervenors may meet the standards approved by the Comptroller General, we believe the equitable course is to remand to the Commission for reconsideration of its holding in light of the Comptroller General's recent decisions.

We leave it to the Commission to determine whether compensation is appropriate and, if so, what further proceedings are appropriate here in order to provide fair consideration of the Durham petitioners' reimbursement request.[6]

All petitions for review are denied, except that the Town of Durham and the Association for the Preservation of Durham Valley, on which we remand to the Commission for further consideration of these petitioners' requests for reasonable reimbursement of their litigation expenses.

VAN GRAAFEILAND, *Circuit Judge,* Dissenting:

I concur with the majority that the petition for review of Greene County and the Town of Greenville be denied but disagree with my brothers' disposition of the petition of the Town of Durham and the Association for the Preservation of Durham Valley.

In 1972, when this case was before us on a prior appeal, we reviewed the statutory authority of the Federal Power Commission and found no basis "to extend the Commission's power to include paying or awarding the expenses or fees of intervenors." *Greene County Planning Board* v. *FPC,* 455 F.2d 412, 426 (2d Cir.), *cert. denied,* 409 U.S.

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6 We recognize that the task of developing detailed standards for awards to intervenors may best be accomplished through rulemaking or through legislation, but this does not mean that the Durham petitioners are not entitled at least to a reasoned explanation for the withholding of reimbursement in their case.

849 (1972). We are now advised that the Comptroller General, presumably after examining the same statutory provisions, has reached exactly the opposite conclusion. Moreover, appellants, Town of Durham and Association for the Preservation of Durham Valley, now demand that we direct the Federal Power Commission to comply with the Comptroller General's contrary interpretation of the law. I cannot agree that this is a proper role for this Court to play.

I can find no statute which empowers the Comptroller General to issue what is in effect a declaratory judgment clothing the Federal Power Commission with authority to disburse public funds, in the face of the Commission's own determination that it has no such power and this Court's finding in support thereof. See 2 West's Federal Practice Manual (1970) § 1721 at 162. His authority and responsibility as the auditing agent of Congress is to provide a sound accounting structure for the government from the standpoint of effective financial control and independent audit. 31 U.S.C. § 65(d); H.R. No. 2556, 1950 U.S. Code Cong. Service, 3707, 3717. While the Comptroller General has not hesitated to withhold approval of disbursements which he has determined to be "illegal", some of his activities in this field have been said to be based upon "dubious authority" and to represent "questionable policy". T. Morgan, *The General Accounting Office: One Hope for Congress to Regain Parity of Power With the President*, 51 N.C. L. Rev. 1279, 1283 (1973). Be that as it may, his administrative control of the purse strings as the representative of Congress gives him power in this area which has not often been challenged by the courts. *See, e.g., Brunswick* v. *Elliott*, 103 F.2d 746, 750-51 (D.C. Cir. 1939). However, when the Comptroller General has gone beyond the bounds of the authority which may legitimately be

construed to be his, the courts have not hesitated to disregard his holdings. *See Miguel* v. *McCarl*, 291 U.S. 442 (1934); *McCarl* v. *Cox*, 8 F.2d 669, 671 (D.C. Cir. 1925).[1]

No officer or agent of the United States may disburse public money unless authorized by Congress to do so. *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294 (1941); *Heidt* v. *United States*, 56 F.2d 559, 560 (5th Cir. 1932); *Fansteel Metallurgical Corp.* v. *United States*, 172 F.Supp. 268, 270 (Ct. Cl. 1959). Congress has specifically provided that sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which appropriations were made and for no others, 31 U.S.C. § 628, and has prohibited any officer or employee from involving the government in any obligation for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such obligation is authorized by law. 31 U.S.C. § 665(a). The Federal Power Commission has never deemed itself authorized to pay the legal fees of private litigants, and, a fortiori, has made no request of Congress for an appropriation to pay these fees. Authorization for this payment must come from Congress, *Turner* v. *FCC*, 514 F.2d 1354, 1356 (D.C. Cir. 1975); it cannot be derived from a letter of the Comptroller General addressed to the chairman of a congressional committee.

31 U.S.C. § 74, relied upon by the majority, permits the head of an executive department, in his discretion, to apply to the Comptroller General for a commitment in advance that the GAO will not question the validity of a specific disbursement in passing upon the account of that department. Such commitment has never been requested

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1 For discussions of the question of judicial review, *see* H. Mansfield, *Judicial Review of the Comptroller General*, 20 Cornell L. Q. 459 (1935); also note in 3 Geo. Wash. L. Rev. (1934) at 97.

by the Federal Power Commission in this case, because it has not sought to exercise the authority which the Comptroller General has conceded to it. In reviewing the determination of the Commission which is presently before us, it is for this Court to decide all relevant questions of law and make all requisite statutory interpretations. 5 U.S.C. § 706. *Mulry* v. *Driver*, 366 F.2d 544, 549 (9th Cir. 1966).[4] We abdicate our responsibility when we treat an unsolicited interpretation by the Comptroller General as the equivalent of a Supreme Court ruling, and needlessly inject the Federal Courts into an area of administrative discretion when we compel the Federal Power Commission to conform its practices to what the Comptroller General opines are proper. *Cf. Greene County Planning Board* v. *FPC*, *supra*, 455 F.2d at 427.[5]

Even if my brothers are correct in holding that we must require the Federal Power Commission to follow the Comp-

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4 In so doing, we should not overlook the Commission's own interpretation of its statutory powers and the practices adopted by it pursuant thereto. *See Lucas* v. *American Code Co.*, 280 U.S. 445, 449 (1930).

5 The majority's attempt to find support for the Comptroller General's decision in the provisions of 16 U.S.C. § 793, which authorizes the Commission to make expenditures "necessary to execute its functions", is in clear contradiction of our prior holding in *Greene County Planning Board* v. *FPC*, *supra*, 455 F.2d 412. A commission's "functions" cannot exceed its powers. The administrative powers of the Federal Power Commission are set forth in section 309 of the Federal Powers Act, 16 U.S.C. § 825(h), and we held in *Greene* that such powers did not include the paying or awarding the expenses or fees of intervenors.

We also pointed out in *Greene*, at 427, that in 1971 the Administrative Conference of the United States "refused to adopt a recommendation which would have endorsed the principle of reimbursing the legal expenses incurred by intervenors in administrative proceedings." Since then, Congress has had legislation under consideration which would authorize administrative agencies to award litigation expenses to intervenors, depending on their contribution to the decision making process. *See* S. Rep. No. 94-863, 94th Cong., 2d Sess. (1976). Until Congress, the people's chosen representative, speaks, it is "inappropriate" for this authorization to be granted by anyone else. *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975).

troller General's ruling, we should not go beyond the scope of that ruling. The Comptroller General's stated position is that only the administrative agency involved can make the determination as to whether payment of the expenses of indigent intervenors is appropriate. The Commission, recognizing that Durham intervened for the protection of its own interests, found payment of its attorneys' fees to be inappropriate. We should not require the Commission to reconsider its discretionary determination merely because we have some doubts about its fairness. 5 U.S.C. § 701(a)(2); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 620 (2d Cir. 1965). Reimbursement of the expenses of private interests who "may sometimes cloak themselves with a semblance of public interest advocates", *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1006 (D.C.Cir. 1966), is a matter properly within the cognizance of the agency involved.

For the foregoing reasons, I respectfully dissent from that portion of the majority's decision which grants the petition of the Town of Durham and the Association for the Preservation of Durham Valley.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,	:	
Petitioners,	:	76-4151 and 76-4153
-v-	:	
FEDERAL POWER COMMISSION,	:	
Respondent,	:	
POWER AUTHORITY OF THE STATE OF NEW YORK and UNITED BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1249,	:	
Intervenors.	:	

- - - - - - - - - - - - - - - - - -x

The motion for rehearing by petitioners Greene County Planning Board and Town of Greenville is hereby denied, and it is further ordered that the opinion of this court, filed December 8, 1976, be amended as follows:

On slip opinion page 818, lines 6-7: strike "with respect to the Durham petitioners".

On page 828, line 5: strike "Durham".

line 9: change "petitioners" to "intervenors".

line 12: strike "Durham".

line 20: add a new footnote 6 after "Valley."

Footnote 6 should read: "The intervenors also may deserve some credit for the Commission's decision to use single rather than double sets of towers and a narrower right-of-way." The subsequent footnote must be renumbered.

On page 828, 3rd to last line: after "Durham" insert "and Greene County".

On page 828, lines 2 and 10 and footnote 6, line 3: strike "Durham".

Replace the last paragraph of the opinion with:

"All petitions for review are denied ex-

cept that we remand to the Commission for further consideration of the petitioners' requests for reasonable reimbursement of their litigation expenses."

s/ J. Edward Lumbard
Circuit Judge

s/ Dudley B. Bonsal
District Judge
(Sitting by designation)

I concur in denying the motion for rehearing.

Inasmuch as I dissented from the court's decision to remand for further consideration of the Durham petitioners' reimbursement requests, I must also dissent from the inclusion of the Greene County Planning Board and the Town of Greenville in the remand.

s/ Ellsworth A. VanGraafeiland
Circuit Judge

June 30, 1977

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

LICENSE (Primary Line); NATIONAL ENVIRONMENTAL POLICY ACT, PRIMARY TRANSMISSION LINE; ENVIRONMENTAL PROTECTION (Transmission Line); PRACTICE AND PROCEDURE (Hearing); FEES

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Power Authority of the State of New York	Project No. 2685

OPINION NO. 751

OPINION AND ORDER AFFIRMING AND ADOPTING INITIAL DECISION AUTHORIZING CONSTRUCTION OF PROPOSED GILBOA-LEEDS TRANSMISSION LINE

(Issued January 29, 1976)

DUNHAM, Chairman:

* * *

FEES AND EXPENSES

Durham, with the concurrence of Greene County, the Sierra Club, and Joe Segelman, excepts to the Judge's denial of their motion that PASNY or, in the alternative, the Commis-

sion pay reasonable attorneys' fees and expenses of expert witnesses. In support of its request Durham argues that its participation in the proceedings established a landmark ruling in Greene County I and assisted the Judge by the presentation of highly qualified expert witnesses. In doing so it claims that many hundreds of hours of attorneys' time had been directed to this matter and many thousands of dollars of expenses and fees have been incurred.

Greene County cites Greene County I as recognizing that the Commission could entertain an application for fees and expenses at the close of the proceedings although at that posture of the proceedings it would not order the Commission or PASNY to pay the fees and expenses.

The Court in Greene County I could see no Congressional mandate for requiring the payment of fees and expenses in Section 309 or 314(c) of the Federal Power Act or in Section 102(1) of

NEPA cited by Greene County, but would not make a final determination of that point in view of the procedural disposition. Durham cites Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) where the court held that environmental groups challenging the Trans-Alaska Pipeline could recover costs and reasonable attorneys' fees. However, it would not assess attorneys' fees against the United States or the State of Alaska. The case was reversed in Aleyska Pipeline Serv. v. Wilderness Soc., ___ U.S. ___, 44L. ed 141, 95 Sup. Ct. 1612 (1975) where the Court held that the Courts had no roving authority to allow counsel fees as costs.

Upon considering this matter further we do not find that Intervenors here have made a case for an award of expenses and fees even if we had the authority to make such an award. The Intervenors represent local towns and land owners who could conceivably have been damaged

by the Gilboa-Leeds line. They had every right to present their cases as have countless other intervenors in cases before the Commission, who intervene for the benefit of local areas either because they do not desire the building of a hydroelectric project or pipeline or because they want it and the energy supplies made available. These intervenors are protecting their own interests, and we see no reason to grant them fees and expenses. If they were generally allowed, a large financial burden would be imposed on this Commission and the taxpayer or upon the utility involved and inevitably on its ratepayers. In the absence of a mandate in the statute we are loath to attempt such an expensive departure from past practice.

* * *

APPENDIX F

LICENSE, PRIMARY TRANSMISSION LINE, FISH AND WILDLIFE, WILDLIFE, RECREATION, POWER POOL, COLLATERAL ATTACK, PRACTICE AND PROCEDURE (Exceptions), PRACTICE AND PROCEDURE (Reopening), STAY, RELIABILITY

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Power Authority of the State of New York) Project No. 2685

OPINION NO. 751-A

OPINION AND ORDER DENYING REHEARING, REOPENING AND STAY

(Issued April 27, 1976)

Per Curiam:

* * *

Durham, et al. reiterate their argument that PASNY or the Commission should reimburse the Intervenors for fees

and expenses. This matter is covered in Opinion No. 751 and further comment is not necessary.

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APPENDIX G

DECISION [SEAL] THE COMPTROLLER GENERAL OF
THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-92288 DATED: February 19, 1976

MATTER OF: Costs of intervention — Nuclear Regulatory Commission

DIGEST: "American rule" explained in Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) and other court cases provides that in absence of authorizing statute, neither court nor regulatory commission may shift litigation costs such as attorneys' fees among litigants. However, this rule is inapplicable to situation considered in B-139703, July 24, 1972, and current situation which involve availability of regulatory commission's appropriations to provide financial assistance to those who

cannot afford to participate in commission's proceedings but whose participation is determined by commission to be necessary to full and fair proceedings.

The General Counsel of the Nuclear Regulatory Commission (NRC) has requested our decision on the following matter:

"The Nuclear Regulatory Commission and its predecessor, the Atomic Energy Commission, have received several petitions from intervenor groups seeking financial assistance to pay the fees of attorneys and technical experts, and for related expenses of participants in nuclear licensing and rulemaking proceedings. The AEC recognized that those petitions raised a question of its

statutory authority and, beyond that, broad and complex policy issues. The purpose of this letter is to request your advice whether the Nuclear Regulatory Commission possesses the legal authority to provide financial assistance to participants in its adjudicatory and/or rule-making proceedings and, if so, under what limitations."

He advises that the Atomic Energy Commission, the NRC's predecessor agency, in its November 20, 1974 Consumers Power Company decision (Dkt. No. 50-155) expressed itself on the issue of its authority to provide financial assistance as "tentatively inclined to the conclusion that such authority exists."

The General Counsel has provided us with a number of representative letters of opinion from both proponents and opponents of a

tentative proposal to fund indigent intervenors, published by NRC in the Federal Register on August 25, 1975 (40 Fed. Reg. 37056-7). We take no position as to the desirability of funding intervenors as a matter of NRC policy. Insofar as the letters of opinion challenged NRC's legal authority to use its appropriated funds for this purpose we have summarized the principal arguments made and have presented our views in the form of a rebuttal to each argument.

(1) The NRC may not use appropriated funds to assist intervenors in the absence of specific statutory authority therefor.

The NRC was established as an independent regulatory agency under the provisions of the Energy Reorganization Act of 1974 (88 Stat. 1242; 42 U.S.C. §5841) and Exec. Order No.

11,334, effective January 19, 1975. The licensing and related regulatory functions formerly assigned to the Atomic Energy Commission, pursuant to the Atomic Energy Act of 1946, as amended by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., were transferred to the NRC. Although there are a variety of NRC proceedings - e.g., NRC rule-making, construction permit, and operating license hearings - for which intervention may be sought, according to a report commissioned by the NRC on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings" ("Report"), Boasberg, Hewes, Klores & Kass, July 18, 1975, "the licensing of nuclear electric generating facilities is the heart of the NRC's regulatory activities. It occupies by far the greatest amount of hearing, staff, board, applicant, and inter-

venor time and resources." Accordingly, we examined the legislative authority for construction permit and operating license hearings particularly. 42 U.S.C. § 2239(a) (1970) provides:

> "In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and

shall admit any such person as a party to such proceeding. * * *" (Emphasis supplied.)

Clearly, NRC has ample authority to conduct a hearing and to admit as a party any one whose interests may be affected by the results of the hearing.

NRC generally receives lump-sum appropriations for salaries and expenses. For example, the most recent appropriation act, the "Public Works for Water and Power Development and Energy Research Appropriation Act, 1976," Pub. L. No. 94-180, December 26, 1975, simply provides:

"For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974 * * *."

B-92288

While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Cen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

The question, of course, is whether it is necessary to pay the expenses of indigent

intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination. We note that NRC's regulatory authorities are extremely broad. As the court pointed out in Siegel v. Atomic Energy Commission, 400 F. 2d 778, 783 (1968), Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."

In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it extends financial

assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. This is essentially the same rationale we followed in our decision B-139703, July 24, 1972, in which we held that the Federal Trade Commission (FTC) had authority to pay certain expenses incurred by indigent respondents and intervenors appearing before the Commission in adjudicative proceedings.

(2) The Comptroller General's decision to the Federal Trade Commission, on which the NRC relied in reaching its "tentative conclusion" in its Consumers Power decision, has been overruled by enactment of the "Magnuson-Moss Warranty-Federal Trade Commission

Improvement Act."

The "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," Pub. L. No. 93-637, 88 Stat. 2183, was enacted on January 4, 1975. Section 202(a) of that Act added a new subsection 18(h) to the Federal Trade Commission Act which provides:

"(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking

proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

"(2) The aggregate amount of compensation paid under this subsection in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either (A) would be regulated by the proposed rule, or (B) represent persons who would be so regulated, may not exceed 25 percent of the aggregate amount paid as compensation under this subsection to all persons in such fiscal year.

B-92288

"(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000."

This provision was added to the Act by the House-Senate conference committee and there is no pertinent legislative history. However, we believe it is likely that since the new statute substantially formalized FTC's rule-making procedures, the conferees wished to formalize the compensation allowable for intervenors as well, in order to enable them to participate more freely in the proceedings. The new provision broadened the class of persons and expenses eligible for financial assistance and placed overall restrictions on the use of FTC's appropriations. We do not feel that enactment of this provision was

intended to overrule or modify the basis of our 1972 decision so as to reflect on its precedent value in dealing with agencies for which Congress has not enacted a similar statutory provision.

(3) The Congress affirmatively declined to authorize the NRC to pay the expenses of intervenors by deleting a Senate amendment to the Energy Reorganization Act of 1974 which would have provided such authority.

During consideration of the bill which was eventually enacted into the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1238, an amendment was introduced by Senator Kennedy which would have specifically provided NRC for a period of 3 years with authority to pay expenses of intervenors. 120 Cong. Rec. S15050-15054 (daily ed., August

15, 1974). The amendment was adopted by the Senate but later deleted by the conference committee. In taking that action, the conference committee states in its report:

> "Title V (section 501) provided that the Commission should reimburse parties in Commission proceedings for reasonable attorneys' fees. The Commission was to set a maximum amount allowed for each proceeding. The amounts paid were to be based upon the extent to which the party contributed to the development of facts, issues, and arguments relevant to the proceeding, and upon the party's ability to pay his own expenses.
>
> "The conferees agreed to delete [this section]. The deletion of title V is in no way intended to express an opinion that parties are or are not now

entitled to some reimbursement for any or all costs incurred in licensing proceedings. Rather, it was felt that because there are currently several cases on this subject pending before the Commission, it would be best to withhold Congressional action until these issues have been definitively determined. The resolution of these issues will help the Congress determine whether a provision similar to title V is necessary since it appears that there is nothing in the Atomic Energy Act, as amended, which would preclude the Commission from reimbursing parties where it deems it necessary." (Emphasis added.)

H. Rep. No. 93-1445, 93d Cong., 2d Sess. 37 (1974). We do not agree that the deletion of the Senate amendment indicated congressional

intent to deny the NRC authority to reimburse intervenors. On the contrary, it appears that the members of the conference committee felt that although they wished to await NRC's final position on the matter, quite possibly specific legislation would not be necessary to authorize such financial assistance since they believe that the Atomic Energy Act as amended already contains the necessary authority.

(4) Recent cases have made it clear that there can be no authority to reimburse participants in the absence of a specific statutory provision.

The three cases cited most frequently by opponents to reimbursement authority are Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975); Turner v. Federal Communications Commission, 514 F.2d

1354 (D.C. Cir. 1975); and Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972). The NRC General Counsel also asks specifically whether these cases affect the Commission's authority to reimburse intervenors for expenses. We do not believe they do.

In Alyeska, environmental groups had sued to stop construction of the trans-Alaska pipeline on the grounds, inter alia, that the Secretary of the Interior was violating the National Environmental Policy Act. The court below had ordered attorneys' fees taxed against Alyeska on the theory that the Society had acted as a private attorney general, vindicating important rights of all citizens and ensuring that the governmental system functioned properly. The Supreme Court reversed, noting that Congress had specifically permitted

shifting of attorneys' fees despite the contrary "American rule" in a variety of circumstances, and holding that such specific statutory authorization was a requisite to recovery. The Court further defined the "American rule" as precluding the prevailing litigant from ordinarily being entitled to collect a reasonable attorney's fee from the loser.

In Turner, intervenors appealed from an order of the FCC denying their request that the licensee which sought a renewal of its license be ordered to reimburse their legal expenses. The court said, "Congress has no more extended a 'roving commission' to the FCC than it has to the Judiciary 'to allow counsel fees as costs or otherwise whenever the . . . [Commission] might deem them warranted'." The court then concluded that,

before an agency may order a litigant to bear his adversary's expenses, it must be granted clear statutory power by Congress.

In Greene County, the petitioner/intervenor was successful in compelling the agency to take a broader view of its National Environment Policy Act (NEPA) responsiblities. Nonetheless, on the question of awarding intervenor financing, the court held that "we find ourselves in agreement with the Commission's position that . . . without a clear congressional mandate we should not order the Commission or PASNY [Power Authority of the State of New York] to pay the expenses and fees of petitioners, either as they are incurred or at the close of the proceedings." (Emphasis added.) In both the Alyeska and Turner cases, plaintiffs, the prevailing parties, sought to force their adversaries to pay their costs,

including reasonable attorneys' fees. All the court did, in our view, is to uphold the "American rule," that in the absence of a statutory provision to the contrary, neither a court nor a regulatory commission may shift the costs from one litigant to the other. In the Greene County case, the court said it had no power to order either the opposing litigants or the agency to pay the costs of the intervenors.

In the matter before us, we are not considering whether NRC has the authority to determine whether one participant in its proceedings should pay the expenses of the other, nor are we concerned with whether the persons to whom financial assistance is extended prevail. There is also no question of compelling NRC to pay the expenses of any of

the parties. We hold only that NRC has the statutory authority to facilitate public participation in its proceedings by using its own funds to reimburse intervenors when (1) it believes that such participation is required by statute or necessary to represent adequately opposing points of view on a matter, and (2) when it finds that the intervenor is indigent or otherwise unable to bear the financial costs of participation in the proceedings.

Notwithstanding the above, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the FTC by the "Magnuson-Moss" Act, supra. We note that the Joint Committee on Atomic Energy is currently considering S.

1665, 94th Congress, which would accomplish the same objectives as the Kennedy amendment discussed, supra. In addition S. 2715, 94th Congress, which would provide general authority for payment of expenses of intervenors in proceedings subject to the Administrative Procedures Act, 5 U.S.C. § 551 et seq. (1970) as well as in specified types of litigation is now before the Senate Committees on Government Operations and Judiciary.

The NRC has asked that, in addition to deciding the question of its authority to pay costs of intervention directly to participants, this Office advise it as to the legality of expenditure of appropriated funds on certain other forms of assistance to intervenors suggested in chapter VI, "Alternatives to Direct Intervenor Financial Assistance" of a

report on "Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings," prepared for the Commission by the law firm of Boasberg, Hewes, Klores and Kass ("Report").

The discussion of alternatives to direct financial assistance to intervenors in the report is wide ranging and includes numerous suggestions, described in varying degrees of detail. Since it is our understanding that the Commission is not actively engaged in implementing any of these alternatives at this time we will not attempt to discuss each one. We will limit our comments to the following observations on the suggestions we consider to be of greatest significance in the context of availability of NRC funds for expenditure.

Procedural Cost Reductions. Section 201(f) of Pub. L. No. 93-438, supra, transferred to

B-92288

NRC all of the licensing and related regulatory functions formerly performed by the Atomic Energy Commission (AEC). With respect to licensing authority, chapter 10 of the Atomic Energy Act of 1954, 68 Stat. 919, 936, approved August 30, 1954, 42 U.S.C. §§ 2131 et seq. (1970) provided that licenses should be issued by the AEC in accordance with chapter 16 of that Act, now codified at 42 U.S.C. §§ 2231 et seq. Under the authority provided by 42 U.S.C. § 2133 NRC is empowered to issue commercial licenses for nuclear utilization and production facilities "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes of this chapter." We believe this authority provides NRC with general powers to issue, modify and change its procedural regulations

as it chooses to accomplish the functions it is required to perform with respect to issuance of commercial licenses. Certainly, nothing prevents the Commission from simplifying procedures and eliminating unnecessary or unduly burdensome requirements which increase the cost to parties of participating in licensing proceedings. This suggestion, thus, poses no legal problems.

Access to Technical Information and Staff.

As part of the suggested procedural cost reductions, the "Report" proposes that NRC provide public participants, including intervenors, with what is described as "in house technical expertise, "by granting participants access to technical information and staff, page 135, "Report." As to this suggestion we note that the conferees on the legislation which became Pub. L. No. 93-438, supra, deleted two sections of

the Senate bill, S. 2744, 93d Congress, as passed by the Senate. Section 206 would have provided parties in NRC proceedings with technical assistance and made available studies and reports prepared or to be prepared by or for the Commission, the Energy Research and Development Administration or any other Federal agency, subject to existing laws concerning disclosure. NRC was to fund this assistance and then seek reimbursement unless the party was unable to provide it. Section 209 would have amended the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 et seq., to provide the public generally with information concerning safety factors. These sections were adopted by the Senate in floor debate, Cong. Rec., daily edition, August 15, 1974, pp. S15034-15047. The conferees did not explain

the deletion of these provisions. See House of Representatives Conference Report 93-1445, supra, p. 37.

NRC must clearly provide such information as provided for by the FOIA. It may provide for easier access to such information. Currently, for example, NRC requires that public participants receive copies of all documents related to a particular facility simultaneously with their receipt by the NRC staff or other parties.

On the other hand, it does not appear that NRC has authority to allow access to its staff to provide a participant's technical expertise. The staff is to serve NRC's needs and may not be used to prepare or assist, other than incidentally, those taking an adversary position in NRC's proceedings.

Provision of Public Counsel. Under the broad mandate to NRC to issue commercial licenses for the utilization and production of atomic materials "subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter" (chapter 10 of the Act of August 30, 1954, as amended, supra, 42 U.S.C. § 2133(a) (1970)), it would appear that the Commission has considerable regulatory flexibility. Thus, as discussed above, if the Commission should find it necessary to the commercial licensing process to establish some form of assistance to participants, including intervenors, who otherwise could not afford to participate, it may do so.

Certainly, however, no authority exists for NRC to supply funds for an

independent Public Counsel outside of the regulatory agency as described in pages 136-138 of the "Report." The "Report" states that at present there is nothing at the Federal level which could be called an independent Office of Public Counsel. We agree with the suggestion on page 138 that the Commission could recommend enactment of legislation to establish special, publicly funded counsel for assistance to participants and intervenors if this appears to be desirable. Proposals for a Consumer Protection Agency are currently being considered by the Congress.

Independent Intervenor Assistance Centers. The comment made above with respect to provision of public counsel is applicable to this suggestion also. Although

we believe the Commission's authority to administer the Atomic Energy regulatory scheme is sufficient to allow provision of some form of assistance to participants, it does not have authority to use its appropriation to finance independent entities not within the jurisdiction and control of the agency where the purpose of those entities is to assist adversary participants in MRC's proceedings.

P.F.KELLER

[Deputy]

Comptroller General
of the United States

APPENDIX H

[SEAL]

COMPTROLLER GENERAL OF THE UNITED STATES
Washington, D.C. 20548

B-180224 May 10 1976

The Honorable John E. Moss, Chairman
Oversight and Investigations Subcommittee
Committee on Interstate and Foreign Commerce
House of Representatives

Dear Mr. Chairman:

This refers to your letter in which you request the advice of this Office, with respect to nine agencies of the Government under study by the Subcommittee on Oversight and Investigations, as to whether public participants in proceedings before those agencies may be assisted in any or all of the following ways:

"(1) the provision of funds directly to participants, (2) modification of procedural rules so as to ease their financial burden on public

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participatns, (3) provision of technical assistance by agency staff, (4) provision of legal assistance by agency staff, (5) creation of an independent public counsel, and (6) creation of a Consumer Assistance Office such as that now employed by the FCC."

The agencies to which you refer are the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, the Interstate Commerce Commission, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, and the National Highway Traffic Safety Administration.

Your letter refers to our decision in the Matter of Costs of Intervention, Nuclear Regulatory Commission (NRC), B-92288,

B-180224

February 19, 1976, to the NRC (hereafter referred to as the NRC decision) in which we considered the legality of providing similar types of assistance to participants and intervenors in NCR rulemaking and licensing proceedings.

Due to the time constraints established by the terms of your request, we have not solicited comments and views of the agencies concerned on the questions your letter poses. However, we have examined, with respect to each agency, some of the statutory and/or regulatory authorities which authorize or direct that public hearings be held for a variety of purposes related to accomplishment of the agency mission. We find that each agency has authority to request participation by members of the general public in its proceedings, either as parties or intervenors,

although there are individual differences in the extent to which such participation would be likely to be required.

Finally, we could discover no statutory prohibition against the provision of any of the types of assistance about which you have inquired.

We thus conclude that there is no significant difference in the relevant authorities for the nine agencies you named and in those of the NRC. Accordingly, the rationale of our February 19 decision to NRC is equally applicable to each agency named.

1. Provision of funds directly to participants. With respect to your first question, appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required

determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. It should be noted that the Federal Trade Commission (FTC) has specific statutory authority, provided by section 202(a) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183, approved January 4, 1975, to provide compensation for expenses of participation for persons appearing before it. This provision is discussed on pages 4 and 5 of our aforementioned decision.

We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the

participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines.

Finally, for the reasons set forth in the NRC decision, we believe it would be advisable for the parameters of such financial assistance, and the scope and limitations on the use of appropriated funds for this purpose to be fully set forth by the Congress in legislation, as was done in the case of the Federal Trade Commission by the provisions of section 202(a) of the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," supra.

2. Modification of procedural rules so

as to ease their financial burdens on public participants. For the reasons stated with respect to NRC in the NRC decision, we find nothing in the laws of any of the agencies considered to prevent simplification of procedures and the elimination of unduly burdensome requirements which increase the cost of participation by parties involved.

3. Provision of technical assistance by agency staff. For the same reasons given under "Access to Technical Information and Staff" in the NRC decision with respect to NRC, the same access to technical expertise may be made available by each agency. As we stated with respect to NRC, this would not extend to the assignment of agency staff members to participants in the role of individual technical advisors for the purpose of advancing the position of a particular party.

4. Provision of legal assistance by agency staff. To the extent a participant needs factual information concerning legal aspects of a proceeding, such as explanations of procedures or examples of documents required to be filed, we believe agency staff members can provide this. However, agency staff could not be permitted to act in the capacity of advocates for a participant.

5. Creation of an independent public counsel. We believe nothing precludes an agency from having its staff present information to the agency's decisionmaking bodies concerning the public interest or consumer viewpoints in the course of a proceeding in order to call attention to relevant opinions not expressed by parties representing private interests. However, no agency could use its appropriations to establish an

independent entity outside its jurisdiction and control.

6. Creation of a Consumer Assistance Office such as that now employed by the FCC. On March 19, 1976, the Federal Communications Commission (FCC) announced the formation of a new Consumer Assistance office. According to a press release from FCC:

"This office will provide a central location or coordinating point within the Commission for members of the public, citizens groups and FCC licensees who seek information or assistance.

* * * * *

"The Consumer Assistance Office represents another step in the FCC's efforts to ensure prompt and accurate response to inquiries and to enhance

public understanding of the Commission's policies and regulations.

* * * * *

"Any person or group wishing information about the Commission's rules, matters pending or material explaining FCC policies and regulations may contact one of the full-time staff members of the Office.

"The Office also will provide information assistance to persons who wish to participate in the Commission's processes or file an application with the FCC but who are unfamiliar with the procedures to be followed.

"Finally, the Office will help prepare attractive and easy to understand brochures explaining Commission regulations and how best to comply with

them."

We have been informally advised by staff of the FCC that this office is not in any way intended to act as an advocate for consumers. It does not include in its staff attorneys or professional experts in other fields. Its function is, basically, that of providing the public with factual information. We are not aware of anything which would preclude any of the agencies named in your letter from establishing a similar office.

We might also point out that our NRC decision would also be applicable to agencies other than the ones mentioned in your letter, assuming that there was no specific legislative prohibition against it, provided that the particular agency holds hearings at which it has the discretion as to whom to admit as participants or intervenors; has

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appropriations available to pay for "necessary expenses" to carry out the missions for which the hearings are being held; and makes the determinations mentioned in the immediately preceeding paragraph. This is also true of the other types of assistance mentioned herein.

Sincerely yours,

R. F. KELLER

[Deputy] Comptroller General
of the United States

APPENDIX I

[Seal] 685

DIGEST - NO CIRCULATION

Comptroller General of the United States
Washington, D.C. 20548

B-139703

SEP 22 1976

The Honorable William Clay
House of Representatives

Dear Mr. Clay:

This is in response to a letter dated August 16, 1976, from you and six other members of the Congressional Black Caucus, asking five specific questions about the authority of the Federal Communications Commission (FCC) to reimburse expenses of persons who participate in proceedings before the Commission. The questions are as follows:

"1. Does the F.C.C. have the authority to make payments to persons who, as determined by the F.C.C., represent an interest the presentation of which contributes or can reasonably

be expected to contribute substantially to a fair determination of an F.C.C. proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interest?

"2. Does the F.C.C. have the authority to make payments to persons who are not formally parties to F.C.C. proceedings but who nonetheless may submit written and/or oral comments and testimony pursuant to F.C.C. regulation, statute or court order?

"3. Does the F.C.C. have the authority to reimburse all the expenses reasonably necessary for a person to participate in an F.C.C. proceeding,

including attorneys' fees, witness fees, related travel and preparation expenses (e.g., phone calls, copy costs, support staff costs) and the expenses incurred in taking depositions?

"4. May payments be based on the prevailing market rate in the private sector for similar services and expenses?

"5. Does the Commission have the authority to make disbursements prior to the commencement of and/or during a proceeding?

As the letter indicates, our Office has confirmed in certain circumstances the authority of Federal regulatory agencies to reimburse the costs of persons who participate in proceedings before them. In

a decision to the Chairman of the Federal Trade Commission dated July 24, 1972, B-139703, we held that the Commission could pay attorney transcript, witness, and attendance expenses incurred by indigent respondents or intervenors upon determination that such payments were necessary for the proper disposition of matters before it. Similarly, in B-92288, February 19, 1976, we sustained the authority of the Nuclear Regulatory Commission to pay costs of indigent intervenor groups before it. Finally, in a letter to the Chairman of the Oversight and Investigations Subcommittee, House Committee on Interstate and Foreign Commerce, B-180224, May 10, 1976, we observed with respect to a number of regulatory agencies, including the FCC, that—

"***appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that [1] it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation.***"

The basic rationale underlying these decisions was stated as follows in B-92288, supra:

"*** While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation

is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id. 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

"The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe

only the administering agency can make that determination. We note that NRC's regulatory authorities are extremely broad.***

"In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determinations unless it extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose.***"

However, we also suggested that it would be advisable for the scope and limitations of such authority to be specified by statute, as has been done in the case of the Federal

B-139703

Trade Commission under section 18(h) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 57a(h)(Supp. V, 1975). We note that legislation is now pending before the Congress which would expressly provide and delimit such authority with respect to Federal agencies generally. See H.R. 13901, 94th Cong. (May 19, 1976); S. 2715, 94th Cong. (May 13, 1976), as reported by the Senate Judiciary Committee, S. Rep. No. 94-863 (1976).

Applying the foregoing to the specific questions raised, we would advise, in response to the first question, that FCC appropriations are available to make payments to persons (and organizations) representing an interest in a matter before it where the Commission determines that such payments are necessary to achieve a fair resolution of the matter.

This conclusion follows from our prior decisions, discussed supra, and is also supported by the legislative history of the act—Pub. L. No. 94-362 (July 14, 1976), 90 Stat. 937, 956—making appropriations to the Commission for fiscal year 1977. See Cong. Rec., June 18, 1976 (daily ed.), H6210 (colloquy between Representatives Burke and Slack).

As indicated in our decisions, the prerequisite to such payments is a determination by the agency that the payments are "necessary" to the accomplishment of its functions. Certainly this would include obtaining presentations or other forms of participation which enable the full and fair resolution of matters before the Commission. However, we would emphasize that our decisions are limited

to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the Commission must determine that both the participation itself and payment therefor are necessary. In the absence of relevant statutory standards, we believe that the Commission must be accorded considerable discretion in making these determinations. Compare H.R. 13901 (page 3, line 15-page 4, line 12), and S. 2715 (page 9, line 7-page 10, line 3), supra, with respect to proposed statutory standards in this regard.

The second, third, and fourth questions each involve matters which we consider to be within the Commission's discretion, subject to the conditions discussed above. As

to the second question, prior to participation by a non-party the Commission must determine that participation by such non-party is necessary in order to enable the Commission to properly dispose of the matter before it, and that financial assistance is necessary in order to enable the non-party to participate. There may well be a situation in which the Commission would determine that participation by, and payments to, non-parties meet this test. Similarly with reference to questions three and four, the Commission would have the discretion to determine that payment--at such rates as FCC may determine reasonable under the circumstances--of any of the expenses listed are necessary for this purpose. Of course, the Commission may impose such limitations as it

sees fit and in any event could not pay more than is reasonable and necessary in order to obtain the required participation.

With reference to the fifth question, 31 U.S.C. § 529 (1970) prohibits the making of advances of public money in any case unless authorized by the appropriation concerned or other law. Since we are not aware of any such authorization on the part of the Commission which would apply here, we must conclude that payments for the participation here involved must be made on a reimbursement basis. Thus the Commission could make disbursements only as participation is actually accomplished. Of course, such participation might be accomplished prior to the close of a Commission proceeding. While the inability to make advance payments might

in some cases impede or prevent the Commission from obtaining desired participation, 31 U.S.C. § 529 clearly requires statutory authority for advance payments in this context. We note that such authority would be specifically provided by H.R. 13901 (page 5, lines 13-18) and S. 2715 (page 11, lines 4-9), supra.

We trust that the foregoing is responsive to the questions raised.

Sincerely yours,

R.F.KELLER

[Deputy]Comptroller General
of the United
States

APPENDIX J

DECISION [SEAL]

THE COMPTROLLER GENERAL
OF THE UNITED STATES
Washington, D.C. 20548

FILE: B-139703 DATE: DEC 3 1976

MATTER OF: Costs of Intervention - Food and Drug Administration

DIGEST: 1. Food and Drug Administration may reimburse costs of otherwise eligible persons or groups who participate in its proceedings where agency determines that such participation "can reasonably be expected to contribute substantially to a fair determination of" issues before it. Participation need not be "essential" in the sense that issues cannot be decided without such participation. B-92288, February 19, 1976, clarified.

PUBLISHED DECISION
56 Comp. Gen. .....

2. Food and Drug Administration may reimburse costs of persons or groups who participate in proceedings before it only where person or group lacks financial resources to participate adequately. Absent specific statutory authority, agency may not adopt more liberal standard of eligibility based on factors other than person's or group's actual financial resources which could be applied to participation in agency proceeding.

3. Food and Drug Administration may not make advance payments for costs of otherwise eligible persons or groups for partici-

pation in proceedings before it, absent specific statutory authority which overcomes prohibition against advance payments in 31 U.S.C. § 529.

4. Food and Drug Administration's authority to reimburse costs of otherwise eligible persons or groups who participate in proceedings before it extends to all types of agency proceedings.

The Acting Commissioner of the Food and Drug Administration (FDA) has requested our decision on certain questions raised by a petition filed by Consumers Union which has been published as an Advance Notice of Proposed Rulemaking in 41 Fed. Reg. 35855 (August 25, 1976).

In general terms the questions presented

to us involve the extent of FDA's legal authority to provide financial assistance, in the form of attorneys fees and other expenses of administrative litigation to certain participants in its adjudicatory and rule-making proceedings. Specific questions are raised concerning the criteria to be applied in determining eligibility for financing the expenses of participants under the terms proposed by Consumers Union in the light of prior statements by this Office on the subject in B-139703, July 24, 1972; B-92288, February 19, 1976; and a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, B-180224, May 10, 1976. See also, our opinion to several members of the Congressional Black Caucus in B-139703, September 22, 1976.

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Our decisions in this area, referred to above, address the extent to which payments to parties and other participants in agency proceedings may be considered "necessary expenses" within the discretion accorded the Federal agency in carrying out its statutory functions. Thus we observed in B-92288, supra, with respect to the Nuclear Regulatory Commission (NRC):

"While 31 U.S.C. § 628 (1970) prohibits agencies from using appropriated funds except for the purposes for which the appropriation was made, we have long held that where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to

expenditures in contravention of law or for some purpose for which other appropriations are made specifically available. 6 Comp. Gen. 621 (1927); 17 id., 636 (1938); 29 id. 421 (1950); 44 id. 312 (1964); 50 id. 534 (1971); 53 id. 351 (1973).

"The question, of course, is whether it is necessary to pay the expenses of indigent intervenors in order to carry out NRC's statutory functions in making licensing determinations. We believe only the administering agency can make that determination.

* * * * *

"In view of the above, if NRC in the exercise of its administrative discretion, determines that it cannot make the required determination unless it

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extends financial assistance to certain interested parties who require it, and whose participation is essential to dispose of the matter before it, we would not object to use of its appropriated funds for this purpose. * * *"

The basic criteria to be applied were stated in B-180224, supra, as follows:

"* * * appropriated funds of each agency may be used to finance the costs of participants in agency hearings whenever the agency finds that (1) it cannot make the required determination unless it extends financial assistance to certain interested parties who require it, and whose representation is necessary to dispose of the matter before it; and (2) the party is indigent or otherwise unable to finance its participation. * * *"

> "We would like to emphasize, however, that it is within the discretion of each individual agency to determine whether the participation of the particular party involved is necessary in order for it to properly carry out its functions and whether the party is indigent or otherwise unable to finance its participation. No party has a right to intervene at Federal expense unless the agency so determines."

Our opinion in B-139703, September 22, 1976, concerning the Federal Communications Commission (FCC), elaborated upon these criteria:

> "* * * FCC appropriations are available to make payments to persons (and organizations) representing an interest in a matter before it where the Commission determines that such payments

are necessary to achieve a fair resolution of the matter. This conclusion follows from our prior decisions, discussed supra * * *.

"As indicated in our decisions, the prerequisite to such payments is a determination by the agency that the payments are 'necessary' to the accomplishment of its functions. Certainly this would include obtaining presentations or other forms of participation which enable the full and fair resolution of matters before the Commission. However, we would emphasize that our decisions are limited to situations in which the payment, as well as the participation, is necessary; that is, lack of financial resources on the part of the person involved would preclude participation without reim-

bursement. Accordingly, the Commission must determine that both the participation itself and payment therefor are necessary. In the absence of relevant statutory standards, we believe that the Commission must be accorded considerable discretion in making these determinations. Compare H.R. 13901 [94th Congress] (page 3, line 15-page 4, line 12), and S. 2715 [94th Congress](page 9, line 7-page 10, line 3), supra, with respect to proposed statutory standards in this regard."

The Consumers Union petition advocates the adoption of standards which would define eligibility for receipt of compensation for costs of participants as follows:

"(a)(1) The Commissioner may provide compensation for reasonable

attorneys' fees, expert witness fees, and other reasonable costs of participation incurred by eligible participants in any rule making or adjudicatory proceeding conducted pursuant to Subparts B,C,D, and E of these regulations, whenever public participation in such a proceeding promotes or can reasonably be expected to promote a full and fair determination of the issues involved in the proceeding.

"(2) Any person is eligible to receive an award under this section * * * for * * * participation (whether or not as a party) in a rule making or adjudicatory proceeding if

"(i) The person represents an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair

determination of the proceeding, taking into account the number and complexity of the issues presented, the importance of public participation, and the need for representation of a fair balance of interests; and

"(ii)(a) The economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings; or

"(b) The person demonstrates to the satisfaction of the Commissioner that such person does not have sufficient resources available to adequately parti-

cipate in the proceeding in the absence of an award under this section."

(Emphasis added.)

FDA's specific questions concerning the proposal, and our responses, are as follows:

1. "Your decision concerning the Nuclear Regulatory Commission indicates that payments can be made if the agency determines that participation is 'essential' to dispose of the matter. We request your views on whether FDA may pay the costs of participants if FDA finds that the participation would be useful in disposing of a matter but cannot conscientiously find that the participation is 'essential.'"

While our decision to NRC did refer to participation being "essential," we did not

intend to imply that participation must be absolutely indispensable. We would agree with Consumers Union that it would be sufficient if an agency determines that a particular expenditure for participation "can reasonably be expected to contribute substantially to a full and fair determination of" the issues before it, even though the expenditure may not be "essential" in the sense that the issues cannot be decided at all without such participation. Our previous decisions may be considered modified to this extent.

2. "Under the Consumers Union petition, assistance could be provided when public participation can 'reasonably be expected to promote a full and fair determination of the issues' and when the participant 'represents

an interest the representation of which * * * can reasonably be expected to contribute substantially to fair determination * * * '

This standard seems to give special weight, in assistance determinations, to the role of the participant in representing consumers and other interests potentially affected by FDA decisions. We would appreciate your views on whether FDA may make awards solely to ensure that a potentially affected interest is represented, or may give the representational role of the participant special weight in deciding whether to provide financial assistance."

As noted in our answer to question 1, we perceive no legal objection to the proposed

standard. Of course, it is the agency that must determine whether the standard has been met in particular cases, and the agency has considerable discretion in this regard.

With respect to the second part of the question, the agency also has discretion in determining the value of a participant's representational role. We do not read the standard as requiring participation of all those representing consumers or other parties affected by FDA determinations unless the FDA also finds that such participation will substantially contribute to the full and fair disposition of the particular matters before it.

3. "Under the financial eligibility criteria in the petition, payment could be made to persons or organizations who have (or have members

with) an economic interest in the outcome which is small in comparison with the costs of effective participation or who demonstrate they do not have sufficient resources to participate adequately. In a May 10, 1976 letter to Congressman Moss, your office indicated that payments may be made to a party who is 'indigent or otherwise unable to finance its participation.' We would like your views on whether payments under the financial criterion in the Consumers Union petition would be authorized."

As stated in our opinion in B-139703, September 22, 1976, supra:

"* * * our decisions are limited to situations in which the payment, as well as the participation, is necessary; that

> is, lack of financial resources on the part of the person involved would preclude participation without reimbursement. Accordingly, the * * * [agency] must determine that both the participation itself and payment therefor are necessary. * * *"

We are still of the view set forth in our prior opinions that a regulatory agency may not pay costs of a party requesting to participate in a regulatory agency proceeding unless the agency first determines that the party is indigent or otherwise unable to finance its participation. Accordingly, it is our view that FDA may not extend financial assistance to a party requesting to participate which has the financial resources to participate but does not, for whatever reason, wish to use its resources for this purpose.

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Section 2.151(a)(2)(ii) of the proposed Consumers Union regulation would permit reimbursement for costs of participation either where lack of sufficient resources can be demonstrated or where:

> "* * * the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person or, in the case of a group or organization, the economic interest of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings * * *."

Since the latter standard, as quoted, is based on factors other than financial ability to participate in a strict sense, we must

conclude that it is not acceptable under our prior decisions and in the absence of specific statutory authority.

Also, we note that the Consumers Union proposed regulation would permit advance payments in certain circumstances. However, unless FDA has specific statutory authority therefor, advance payments would be precluded by 31 U.S.C. § 529 (1970). See B-139703, September 22, 1976, supra, at page 4.

4. "* * * the Consumers Union petition asks that awards be available for hearings in connection with rule-making and adjudicatory proceedings, including public hearings before a public advisory committee pursuant to Subpart D of the proposed regulations on administrative practices and procedures published in the

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September 3, 1975 Federal Register (40 FR 40682). The NRC decision dealt only with costs of participation in an adjudicatory licensing hearing."

We see no basis for distinction in terms of the nature of agency proceedings for the purposes here relevant.

5. "Like the Nuclear Regulatory Commission, the Food and Drug Administration generally receives a lump sum appropriation for salaries and expenses. The Agency does not have any express statutory authority to use its appropriated funds specifically to assist participants.

"Any expenditure made by FDA to provide assistance to participants will also come within the scrutiny

of the Congressional subcommittees responsible for our appropriations, i.e., the Subcommittees for Agriculture and Related Agencies of the House and Senate Appropriation Committees. We would appreciate your comments on whether we need to obtain the views of these subcommittees on this issue, or whether these subcommittees have expressed agreement with your position on this matter."

Our opinions in this area are concerned only with the availability of appropriations as a matter of law. Strictly speaking, notice to, or approval by, the appropriations subcommittees is not required for the use of appropriations sanctioned by our opinions, assuming that there are no applicable statutory requirements for prior congressional approval.

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Thus the question raised here is one of policy and the relationships between the agency and the subcommittees which we cannot resolve. Our Office does, of course, favor the greatest possible disclosure of spending activities to interested congressional committees and subcommittees.

In response to the final question, we are not aware that the subcommittees referred to have expressed any views on our opinions in this area.

R.F. KELLER

Deputy Comptroller General
of the United States

APPENDIX K

Section 2 of the Federal Power Act (16 U.S.C. § 793) provides, in pertinent part:

"The commission may make such expenditures . . . as are necessary to execute its functions. . . ."

Section 308 of the Federal Power Act (16 U.S.C. § 825g) provides, in pertinent part:

"(a) Hearings under this chapter may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding,

or any other person whose participation in the proceeding may be in the public interest."

Title IV of the Public Works for Water and Power Development and Energy Research Appropriation Act, 1977 (Pub. L. No. 94-355, 90 Stat. 889, 898) provides, in pertinent part:

"Federal Power Commission

Salaries and Expenses

For expenses necessary for the work of the Commission, as authorized by law, . . . $41,582,000."